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**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

Application of the Department of Natural
Resources for a Permit to Place an Electronic Fish
Barrier on the Bed of the East Branch of the Rock
River, Town of Williamstown, Dodge County,
Wisconsin

Case No. 3-SC-99-2003

FINDINGS OF FACT, CONCLUSIONS OF LAW AND PERMIT

The Department of Natural Resources, N 7725 Highway 28, Horicon, Wisconsin 53032, completed filing an application with the Department of Natural Resources for a permit to place structures on the bed of the East Branch of the Rock River. The proposed structure is an electric carp barrier and mechanical fish trap to allow capture and removal of rough fish from the Horicon Marsh. The proposed project is located in the Town of Williamstown, Dodge County, in the NW ¼ of the SE ¼ of Section 16, Township 12 North, Range 16 East. The proposed site is just upstream of the Greenhead Boat Landing.

The Department of Natural Resources issued a Notice of Proposed Structure which stated that unless written objection was made within 30 days of the publication of the Notice, the Department might issue a decision on the permit without a hearing. The Department received several timely objections from nearby riparian landowners

Pursuant to due notice hearing was held at Beaver Dam, Wisconsin on October 27, 1999, and November 5, 1999, Jeffrey D. Boldt, administrative law judge (the ALJ) presiding.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Wisconsin Department of Natural Resources, by

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James Breselow
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FINDINGS OF FACT

1. The State of Wisconsin Department of Natural Resources (the DNR), N7725 Highway 28, Horicon, Wisconsin, 53032, completed filing an application with the Department for a permit under sec. 30.12, Stats., to place structures on the bed of the East Branch of the Rock River, Town of Williamstown, Dodge County. The Department has fulfilled all procedural requirements of secs. 30.12 and 30.02, Stats

2. The applicant owns real property located in the NW ¼ of the SE ¼ in Section 16, Township 12 North, Range 16 East, Dodge County. The above-described property abuts the East Branch of the Rock River which is navigable in fact at the project site. The site location is just above the Greenhead boat launch in the Town of Williamstown.

3. The applicant proposes to construct an electronic carp barrier and mechanical fish trap to allow for the capture and removal of rough fish from areas the DNR manages in the Horicon Marsh State Wildlife Area (the marsh). Electric cables will be placed across the Rock River, which is 100 to 150 feet wide at the project site. An electric current will shepherd carp into the trap, where rough fish will be removed. Water depths in the area are from two to six feet deep. The section of the river below the Kekoskee dam is navigable and is used primarily by small motorized craft and canoes. Rough fish will be removed largely by volunteers with Department staff bearing ultimate responsibility for carp removal.

4. The purpose is to remove carp and other rough fish, and to improve water quality, plant and wildlife diversity and fishing values in the marsh.

5. The proposed structures will interrupt existing navigation on the East Branch of the Rock River, but will not be detrimental to the public interest upon compliance with the conditions of this permit.

6. There was no real dispute that carp are detrimental to the public interest in maintaining a healthy marsh eco-system on the East Branch of the Rock River. There is also no dispute that the river is currently over-run with carp. In a recent fish survey, over 97 percent of fish were either carp (48.45 percent) or bullhead (48.7 percent), both rough fish species. (Ex. 17) Further, the proliferation of carp is detrimental to the health of the Horicon Marsh eco-system. (Stremick) Ms. Laura Stremick, the WDNR Fish Biologist, provided undisputed expert testimony that carp have a detrimental impact on aquatic vegetation, particularly submerged plant species. Sago pond weed, coontail, pickerel weed, and wild rice are common in some areas of the Horicon Marsh, but are disrupted by the feeding activities of carp and the stirring bottom sediments. (Stremick) In his classic study of Wisconsin fish, Professor Becker identified these plant species as being vulnerable to an overabundance of carp. (Ex. 15, p. 424) The decline in the diversity of plants has a detrimental impact on water quality in the East Branch of the Rock River and the Horicon Marsh as a whole. Further, the lack of plant diversity has had a substantial impact on furbearer populations, including the valuable Horicon Marsh muskrat harvest. (Nelson, Ex. 8)

7 The barrier will represent an obstruction to navigation. However, this obstruction will not be material upon compliance with the permit conditions set forth below. In an attempt to mitigate the impact of the materiality of the obstruction to navigation, the Department has made a number of accommodations. First, the DNR plans to create a gravel portage area around the barrier and trap. Further, a mechanical, dry-land boat slide will be installed for use of persons having difficulty portaging around the barrier. Second, the DNR has indicated that it will install a new boat launch upstream of the dam off Greenhead Road (Nelson) Further, the electric wire, and accompanying safety buoys and markers will be removed when not in use. Stremick indicated that, ultimately, the barrier need not be operated more than three months of the year. However, Stremick requested that DNR staff be allowed two full years to understand optimal times for carp removal. Mr. James Breselow testified that he is a riparian landowner near the proposed barrier site and that he and his family make use of the river for boating, fishing, particularly for bullhead, and for duck-hunting. Breselow noted that the barrier would be a particular burden and difficult to portage for duck-hunters given all of the equipment they carry. Breselow makes a good point. The permit contains a condition urging the Department to keep the barrier non-operational during duck-hunting season to the extent possible consistent with carp-reduction goals.

8. Several objections were raised relating to the choice of the site for installation of the fish barrier and trap. However, Ms. Stremick was persuasive that there were several good reasons for choosing the project site. First, the site is accessible to vehicles removing trapped

carp; second, the site has the electricity necessary to operate the electronic fish barrier; third, the location is excellent to capture and remove carp moving up the river toward the higher dissolved oxygen found around the aerated areas near the dam, fourth, many other historic sites were no longer available because they have become too silted-in. Accordingly, there was a rational basis for the project site in terms of meeting the DNR's goals of rough fish removal and restoration of the Horicon Marsh.

9. The record supports a condition that the barrier shall be in place year-round for no more than the next two years. After that period, it shall be operated no more than 100 days per year. The DNR shall give due consideration to the needs of boaters in determining if maintenance of the structure is necessary.

10. The applicant is financially capable of constructing, maintaining, monitoring or removing the structures if they should be found in the public interest to do so.

11. The proposed structures will not reduce the effective flood flow capacity of the Rock River upon compliance with the conditions in the permit.

12. The proposed structures will not adversely affect water quality nor will it increase water pollution in the Rock River. As set forth above, a reduction of the number of carp will have a positive impact on water quality in the river and the marsh as a whole. The structures will not cause environmental pollution as defined in sec. 299.01(04), Stats., if these structures are built and maintained in accordance with this permit.

13. The DNR has complied with the procedural requirements of sec. 1.11, Stats., and Chapter NR 150, Wis. Admin. Code, regarding assessment of environmental impact.

DISCUSSION

The DNR does not ordinarily require a Chapter 30 permit for management activities subject to its control. However, in this case the Department has consented to the jurisdiction of the Division to consider the placement of the fish barrier and trap as any other structure subject to sec. 30 12(2), Stats.

Accordingly, the permit application turns upon a balancing of competing interests in the public waters of the state. There is no question that the river and marsh eco-system would benefit significantly from a reduction in the number of carp. There is likewise a strong public interest in maintaining an open river for navigation by small watercrafts making use of the public waters of the Rock River. The barrier and trap are an obstruction to such navigation and must, accordingly, be only a temporary measure in the Department's effort to control carp. The permit,

as issued, places restrictions on the duration of the barrier and trap and on the number of days in which the trap can be operated.

It is hoped that the DNR will fairly evaluate the barrier and trap in two years and will remove it if it is no longer needed or if it has proven to be ineffective.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority under secs. 30.12 and 227.43(1)(b), Stats., and in accordance with the foregoing Findings of Fact, to issue a permit for the construction and maintenance of said structures subject to the conditions specified.

2. The applicant is a riparian owner within the meaning of sec. 30.12, Stats.

3. The proposed fish barrier and trap described in the Findings of Fact constitute structures within the meaning of sec. 30.12, Stats.

4. The project is a type III action under sec. NR 150.03(8)(f)4, Wis. Admin. Code. Type III actions do not require the preparation of a formal environmental impact assessment.

PERMIT

AND THERE HEREBY DOES ISSUE AND IS GRANTED to the applicant, a permit under sec. 30.12, Stats., for the construction of structures as described in the foregoing Findings of Fact, subject, however, to the conditions that:

1. The authority herein granted can be amended or rescinded if the structure becomes a material obstruction to navigation or becomes detrimental to the public interest.

2. Any area disturbed during placement shall be seeded and mulched as necessary to prevent erosion.

3. The permittee shall place the barrier and trap continuously for a period no longer than two years from the date of issuance of this permit.

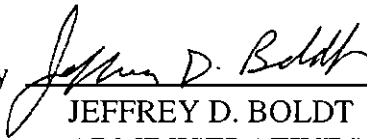
4. After the above described two-year period, the barrier and trap shall be operational no more than 100 days of any calendar year. The Department shall devise a reasonable signage system to advise the public if the barrier is operational. The DNR should make every effort to keep the river open during a significant portion of duck-hunting season.

5. After a period of three years of operation, the DNR shall conduct a review of the effectiveness of the barrier and trap, and shall actively seek public comment.

Dated at Madison, Wisconsin on November 12, 1999.

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By



JEFFREY D. BOLDT
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.